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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~584~~ 34

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, APPELLANTS,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM PROBATE COURT OF NORFOLK COUNTY, STATE OF MASSACHUSETTS

FILED JANUARY 18, 1930

(34,715)

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SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1930

[fol. a]

IN PROBATE COURT OF NORFOLK COUNTY

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Trustees, Appellants,

v.

HENRY F. LONG, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby agreed that the portions of the record hereinafter specified and no others be included in the transcript to be transmitted to the Supreme Court of the United States in connection with the appeal of Harold J. Coolidge and Augustus P. Loring, trustees, from the decree entered by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts on December 23, 1929, dismissing the petition brought by them against Henry F. Long, Commissioner of Corporations and Taxation of said Commonwealth, for the abatement of an inheritance tax assessed upon the estate of Julia Coolidge:

1. Petition (filed November 8, 1927).
2. Motion to amend petition (allowed December 21, 1927).
3. Answer.
4. Stipulation (including copy of declaration of trust and copy of assignment).
5. Reservation and report.
6. Supplement to reservation.
7. Rescript.
8. Opinion of Supreme Judicial Court.
9. Final decree after rescript (entered December 23, 1929).

[fol. b] 10. Petition for appeal, assignment of errors and prayer for reversal.

11. Order allowing appeal.
12. Bond on appeal.

13. Citation (with acceptance of service).
Storey, Thorndike, Palmer & Dodge, Solicitors for Appellants. Joseph E. Warner, Attorney General, by James S. Eastham, Ass't Atty. General.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 1] IN PROBATE COURT OF NORFOLK COUNTY

PETITION—Filed Nov. 8, 1927

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represent Harold J. Coolidge of Boston, Suffolk County, Massachusetts, and Augustus P. Loring, of Beverly, Essex County, Massachusetts, petitioners, that they bring this petition against the Commissioner of Corporations and Taxation, respondent, and allege him to be the only party interested in the matter of [redacted] petition, and further represent that they are the Trustees under a certain deed and declaration of trust, dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii; that on November 10, 1926, they paid under protest taxes in the amount of $20,082.01 assessed by the Commissioner of Corporations and Taxation on account of property passing under the said deed and declaration of trust; that as such Trustees they are aggrieved by the determination of the tax liability and assessment as aforesaid.

Wherefore your petitioners respectfully pray for the abatement of said taxes, or so much thereof as your Honorable Court may determine to have been assessed without authority at law.

[fol. 2] Dated this seventh day of November, 1927.

Harold J. Coolidge, Augustus P. Loring.

The undersigned, being all the persons interested in the subject-matter of the above petition, hereby accept service of the same.

——, ——.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 2½] [File endorsement omitted.]

[fol. 3] In Probate Court of Norfolk County

(Estate of J. Randolph Coolidge)

Harold J. Coolidge et al., Trustees,

v.

Commissioner of Corporations and Taxation

Motion to Amend Petition and Order Allowing Same

Now come the above named petitioners and move to amend the petition so that it will read in accordance with the copy hereto annexed.

Harold J. Coolidge, Augustus P. Loring, Trustees.

Dec. 21, 1927.

Motion to amend allowed.

Joseph R. McCoole, Judge Probate Court.

[fol. 4] In Probate Court of Norfolk County

Amended Petition—Filed Dec. 14, 1927

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represents Harold J. Coolidge, of Boston, Suffolk County, Massachusetts, and Augustus P. Loring, of Beverly, Essex County, Massachusetts, trustees, petitioners, that they bring this petition against the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, respondent, and allege him to be the only party interested in the matter of said petition, and further

represent that they are the trustees under a certain deed and declaration of trust dated July 29, 1907, executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others; that J. Randolph Coolidge has died leaving an estate within the jurisdiction of the Probate Court for the County of Norfolk; that the respondent has assessed an inheritance tax upon the estate of said J. Randolph Coolidge and as a part thereof has assessed a tax in the amount of $25,201.82 upon the interests passing under said deed and declaration of trust; that your petitioners on November 10, 1926 paid under protest the said amount of $25,201.82; that they are aggrieved by the determination of said tax and its assessment as aforesaid.

Wherefore your petitioners respectfully pray that said tax may be abated in full and that the respondent may be ordered to repay them the amount thereof with interest and costs.

[fol. 5] Dated this 7th day of November, 1927.

Harold J. Coolidge, Augustus P. Loring, Trustees.

The undersigned, being all the persons interested in the subject matter of the above petition, hereby accept service of the same.

——— ———.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 5½] [File endorsement omitted.]

[fol. 6] In Probate Court of Norfolk County

[Title omitted]

Answer—Feb. 3, 1928

Now comes Henry F. Long, as he is Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, and for answer to the petition herein filed says as follows:

1. He admits that the petitioners are trustees under a certain deed and declaration of trust, dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii; that on November 10, 1926, they paid under protest taxes in the amount of $25,201.82 assessed by him as said Commissioner on account of property passing under the said deed and declaration of trust; but denies each and every other allegation of fact or conclusion of law contained in the said petition.

2. In particular the Commissioner denies that the petitioners as such trustees were aggrieved by the determination of the tax liability and assessment as aforesaid, but says that the said tax was properly determined and assessed by him as Commissioner.

Wherefore he prays that the petition be dismissed, with costs to be paid by the petitioners.

Henry F. Long, Commissioner of Corporations and Taxation, by Arthur K. Reading, Attorney General, by James S. Eastham, Assistant Attorney General.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 7] In Probate Court of Norfolk County

[Title omitted]

Stipulation as to Facts—May 28, 1928

In the above-entitled cause and for the purposes thereof, and for none other, it is hereby stipulated and agreed as follows:

1. J. Randolph Coolidge, husband of Julia Coolidge, died November 10, 1925, a resident of Brookline, Massachusetts.

2. On July 29, 1907 J. Randolph Coolidge joined with his wife in transferring certain real and personal property to trustees, and the trustees executed a declaration of trust, a copy of which is hereto annexed.

3. The said transfer was voluntary and was not a bona fide purchase for full consideration in money or money's worth.

4. Four-sevenths of the property conveyed to the trustees as aforesaid was furnished by J. Randolph Coolidge and three-sevenths by his wife.

5. On April 6, 1917, J. Randolph Coolidge and his wife executed an assignment of all their interest in the trust funds and all their right to receive the income therefrom to their sons J. Randolph Coolidge, Jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge. A copy of this assignment is hereto annexed.

[fol. 8] 6. The said five sons were all living at the death of J. Randolph Coolidge who survived his wife Julia Coolidge and died November 10, 1925.

7. As of the said date of the death of J. Randolph Coolidge the value of four-sevenths of the property then held by the petitioners as the present trustees under the aforesaid declartion of trust was $669,400.41. As a result of changes of investments the said property was not the same as that originally in the trust.

8. The Commissioner of Corporations and Taxation determined that the petitioners were subject to an inheritance tax under G. L. c. 65, s. 1 as amended upon the aforesaid four-sevenths of the net trust property as of November 10, 1925 and accordingly assessed a tax of $25,201.82 which the petitioners paid under protest on November 10, 1926.

9. If the trust property is subject to an inheritance tax the amount was correctly figured by the Commissioner.

Harold J. Coolidge, Augustus P. Loring, Trustees, by Robert G. Dodge, Att'y. Henry F. Long, Commissioner of Corporations and Taxation, by James S. Eastham, Assistant Attorney General.

[fol. 9] EXHIBIT TO STIPULATION

Declaration of Trust

Whereas J. Randolph Coolidge of Brookline, in the county of Norfolk and Commonwealth of Massachusetts, has by

his deed of even date herewith conveyed certain real estate situated in Boston, county of Suffolk and Commonwealth aforesaid, to wit: A parcel of land, with the buildings thereon numbered 19 to 25 High Street, 175 to 179 Federal Street, and 150 to 152 Summer Street in said Boston, to Augustus P. Loring of Beverly, county of Essex and Commonwealth aforesaid to the use of the said J. Randolph Coolidge, and of the said Augustus P. Loring and of Harold J. Coolidge of said Boston, and the survivor of them, in trust upon certain trusts; and

Whereas Julia Coolidge of said Brookline, wife of the said J. Randolph Coolidge, has by her deed of even date herewith conveyed certain real estate situated in said Boston, to wit: Two several parcels of land, with the buildings thereon, one of them being numbered 62 to 64 Sumner Street, and the second numbered 26 to 30 on Federal Street and 127 on Congress Street, in said Boston, to the said Augustus P. Loring to the use of the said J. Randolph Coolidge, Augustus P. Loring and Harold J. Coolidge, and the survivor of them, in trust upon the same trusts; and

Whereas the said J. Randolph Coolidge and the said Julia Coolidge have each of them by an instrument executed on the twenty-ninth day of July, 1907, assigned and transferred certain personal property as described in the schedule annexed to said instruments, to the aforesaid J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge, to hold as trustees upon the same trusts; and

Whereas the said J. Randolph Coolidge and Julia Coolidge may prior to the first of September, 1907, convey or [fol. 10] transfer other real estate or personal property to the said trustees to be held upon the same trusts; therefore, be it known, that we, the above-mentioned J. Randolph Coolidge, Augustus P. Loring, and Harold G. Coolidge, do hereby declare that we do hold upon the following trusts, the said real estate and personal property herein referred to, and such other property as may be conveyed or assigned to us prior to September 1, 1907, to hold upon the terms of this trust, together with all accumulations and accretions of the trust fund hereby created, and all property substituted for the original fund under the powers herein given:

1st. In trust to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge

four sevenths (4/7) and three sevenths (3/7) respectively to each so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust property among the following persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distributions in effect at the time of the death of such survivor, provided that in no case shall a surviving widow take as distributee, more than one-half of said share.

2nd. The trustees shall have full power to make, vary, and change investments, and may invest in such real estate, personal property, stocks, bonds and other securities [fol. 11] or property as in their opinion are proper investments for this trust fund.

3rd. They may sell any or all the trust property original-accruing or substituted, at such times, in such manner, and for such considerations as they think fit, and may convey the same in fee or for any less estate, and no purchaser shall be required to see to the application of the purchase money paid by him to the trustees or either of them.

4th. They may, in their uncontrolled discretion let or lease the real estate on short or long leases, or on building leases, part of the consideration for which is the improvement of the premises; and no lessee shall be liable for the application of any payment of money made to the trustees or any of them.

5th. They may improve, alter, or rebuild the trust buildings, or build new buildings on the trust lands or on land acquired for that purpose, and may make contracts binding the trust property for the purpose of carrying out any of their powers; but they shall not bind the beneficiaries of the trust, nor need they bind themselves personally.

6th. They may determine what receipts and payments shall be charged or credited to income or principal, and their determination made in good faith shall be final.

7-. They may employ such brokers, engineers, clerks, collectors, agents, or attorneys as they see fit, and shall not be liable for their misbehavior.

8th. They shall account to the beneficiaries once a year, and shall be entitled to receive as compensation for their services five per cent upon the gross amount of the income, and such compensation for extra services as a majority of those beneficiaries who are sui juris shall approve.

[fol. 12] 9th. All the powers given to the trustees named shall pass to the survivors or survivor and to successors or successor in the trust. At any time when there are three or more trustees in office, any of the trustees may delegate all his powers and authority to the other trustees by any instrument under seal duly recorded, which shall remain in force until revoked by an instrument similarly executed and recorded, provided that such delegated power shall not be exercised by less then two trustees.

10th. Any vacancies in the number of the trustees may be filled or an additional trustee or trustees may be appointed by the trustees or trustee in office with the assent of the majority of the beneficiaries who are sui juris. If there are no trustees in office, then a trustee or trustees may be appointed by not less then three-fourths of the beneficiaries who are sui juris; and all appointments made under the powers given trustees or beneficiaries by this clause shall be made by an instrument in writing signed and sealed by the parties making the appointment and acknowledged by at least one of them. If no appointment is so made within thirty days from the date when there has ceased to be a trustee in office, any party in interest may apply to the probate court for Suffolk County to appoint a new trustee or trustees.

11th. No trustee hereunder shall be required to give a bond for the faithful performance of his duties, nor shall any trustee be liable for the acts or defaults of another trustee; but each trustee shall be liable for his own willful acts or defaults only.

In witness whereof we have hereunto set our hands and seals this twenty-ninth day of July 1907.

J. Randolph Coolidge, Augustus P. Loring, Harold J. Coolidge (and each a seal).

[fol. 13] We, the undersigned J. Randolph Coolidge and Julia Coolidge assent to the above declaration of trust.

J. Randolph Coolidge, Julia Coolidge.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, July 29, 1907.

Then personally appeared the above named J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge and acknowledged the foregoing instrument to be their free act and deed before me.

Harold D. Apollonio, Justice of the Peace.

A true copy of an instrument left for record with Suffolk deeds July 29, 1907, at four o'clock and twenty-seven minutes P. M.

Attest:

(Signed) Wm. T. A. Fitzgerald, Register.

[fol. 14] EXHIBIT TO STIPULATION

Assignment

Whereas J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts, did by certain instruments dated July 29, 1907, convey certain real estate and personal property belonging severally to them to J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge in trust for certain purposes, and

Whereas a certain declaration of trust signed by the said J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge as trustees, and assented to by the said J. Randolph Coolidge and Julia Coolidge, dated on said July 29th, 1907, and recorded in Suffolk Deeds Book 3227, page 260, sets forth the purposes of said trust to be as follows:

To pay the income from the trust fund in certain proportions to the said J. Randolph Coolidge and Julia Coolidge so long as they both live, and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following named persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph

Coolidge, junior, John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, and

Whereas the said J. Randolph Coolidge and Julia Coolidge now desire to transfer and assign all their title and interest in and to the income of said trust fund in equal shares to their said five children who are now all living.

Now then, we the said J. Randolph Coolidge and Julia Coolidge in consideration of one dollar and other good and [fol. 15] valuable consideration to us paid by the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, the receipt whereof is hereby acknowledged, do hereby transfer, convey, and assign to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, in equal shares, all our interest in said trust fund, and all our right to receive the income therefrom, including additions thereto and any accrued income which has not already been paid over to us.

To have and to hold the same to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, their executors, administrators, and assigns forever.

And we hereby request and direct Harold J. Coolidge and Augustus P. Loring, the present trustees of said fund, henceforth to pay over the income to our said five children in accordance with this assignment.

In witness whereof we hereunto set our hands and seals this sixth day of April, 1917.

(Signed) J. Randolph Coolidge (Seal.) (Signed) Julia Coolidge.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, April 6, 1917.

Then personally appeared the above named J. Randolph Coolidge and Julia Coolidge, and acknowledged the foregoing instrument by them signed to be their free act and deed.

Before me,

(Signed) Howard S. Patterson, Justice of the Peace.

[fol. 16] We, the undersigned, being the present trustees of the above-mentioned trust fund, hereby acknowledge the receipt of notice of the above assignment.

(Signed) Harold J. Coolidge, Aug. P. Loring.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 17] In Probate Court of Norfolk County

[Title omitted]

Reservation and Report—Sept. 12, 1928

These petitions for abatement of the Massachusetts Inheritance Tax, filed by Harold J. Coolidge and Augustus P. Loring trustees under a certain deed and declaration of trust dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii, came before me for final determination, and being in doubt as to the decrees which should be entered I now reserve and report upon the pleadings and stipulations all questions of law for the consideration of the Supreme Judicial Court, in accordance with General Laws, Chapter 215, Section 13 to determine what decrees should be entered.

September 12, 1928.

Joseph R. McCoole, Judge of Probate Court.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 18] In Probate Court of Norfolk County

[Title omitted]

Supplement to Reservation—Nov. 7, 1928

The following rulings (which were requested by the petitioners at the hearing upon the above-entitled petition)

may be referred to as a part of the reservation and report of said petition heretofore filed:

1. G. L. c. 65, s. 1, does not, according to its true construction, purport to authorize the imposition of the tax now in question.

2. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is repugnant to Article XII of the Bill of Rights.

3. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is in excess of the power granted to the General Court by Article IV of Section I of Chapter I of the Constitution of Massachusetts.

4. If G. L. c. 65, s. 1, purports to authorize the imposi- of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.

[fol. 19] 5. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.

6. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

7. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Joseph R. McCoole, Judge of Probate Court.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 20] In Supreme Judicial Court of Massachusetts

Rescript—Sept. 11, 1929

In the Case of

Harold J. Coolidge et al., Trustees,

vs.

Commissioner of Corporations & Taxation

Pending in the Probate Court for the County of Norfolk

Ordered that the register of probate and insolvency in said county make the following entry under said case in the docket of said court, viz., Decree to be entered denying the petition for abatement.

By the Court.

Walter F. Frederick, Clerk.

September 11, 1929.

[fol. 21] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth in length in the opinion, filed with the reporter of decisions, to which reference is made.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 22] In Supreme Judicial Court of Massachusetts

Opinion—Sept. 11, 1929

Rugg, C. J.:

These are petitions brought, under G. L. c. 65, § 30, to determine the validity of succession taxes. The petitioners are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners.

By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his interstate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. Coolidge v. Loring, 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five [fol. 23] sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, § 1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925.

There is no controversy as to the amount of the excise if any is due.

When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors.

Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers. There had been approved on June 27, St. 1907,

c. 563, which took effect on September 1, 1907, about five weeks after the date of the declaration of trust. This is the first relevant statute. Its provisions were:

§1. "All property within the jurisdiction of the Commonwealth * * * which shall pass by * * * deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person * * * shall be subject to a tax * * *" §25. "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date * * *" Said § 1 was amended in particulars not here material by St. 1912, c. 678, § 1.

It was provided by § 3 of the latter statute: "The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in [fol. 24] cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof * * *"

Said § 25 was amended by St. 1914, c. 563, § 1, so as to read: "This part shall not apply to * * * property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date (September 1, 1907) * * *" The relevant statutory provisions operative since January 1, 1921, are in G. L. c. 65, as follows:

§1. "All property within the jurisdiction of the commonwealth * * * which shall pass by * * * deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth * * * made or intended to take effect in possession or enjoyment after his death * * * to any person, absolutely or in trust * * * shall be subject to a tax * * *"; §36. "This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty * * *"

The question for decision is whether the net trust estate passing to the sons on the death of the surviving settlor is subject to excise taxes under these statutes.

The "tax authorized by these statutes is a tax upon 'succession' which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property.' See Attorney General v. Stone, 209 Mass. 186, 190; Minot v. Winthrop, 162 Mass. 113, 124; Crocker v. Shaw, 174 Mass. 266, 267 * * * we are here concerned, not with a tax on the privilege of transmission, not with an [fol. 25] attempt to tax a donor's estate for an absolute gift made when no tax was thought of, * * * but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, Stebbins v. Riley * * * (268 U. S. 137), or effected by deed, Keeney v. New York, 222 U. S. 525; Chanler v. Kelsey * * * (205 U. S. 466); Nickel v. Cole * * * (256 U. S. 222).

The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor. * * * So long as the privilege of succession has not been fully exercised it may be reached by the tax." Saltonstall v. Saltonstall, 276 U. S. 260, 269, 270, 271, affirming Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, where earlier Massachusetts decisions are reviewed. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, Mass. Adv. Sh. (1929) 1233, 1235.

The settlors by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust. It then passed irrevocably from their control. After that they possessed only rights to the income.

Thus they did not divest themselves of all interest in the property. They stripped themselves of those rights in April, 1917. That is not pertinent to the issues here involved because before that time the statute had been changed as to taxation of successions so as to include the kind of succession established by the deed of July, 1907. Confessedly at the time of the execution of the trust deed there was no statute exacting an excise on the transfer

of the property or on succession to it. This, however, in [fol. 26] our opinion is not a decisive factor. The present excise under the statute was levied on the succession, not on the transmission, of the trust fund.

As already pointed out succession is a quite different thing from transmission. It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate.

The excise statute here controlling and already quoted is designed to include within its sweep all methods of succession to property to take effect in possession on enjoyment after the death of the grantor or donor other than those made inter vivos for a bona fide consideration.

By express words it embraces succession created by deed. Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute.

The succession to any of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity. Magee v. Commissioner of Corporations & Taxation, 256 Mass. 512, 515.

The assignment of their life interest in the income of the trust by the settlors to their sons in 1917 did not operate to alter the nature of the trust instrument or of the transaction out of which spring the rights of the final beneficiaries. It is obvious that this assignment did not, even in combination with the trust instrument of July, 1907, vest the entire interest in the trust in the five sons.

That was recognized by the position of the trustees, set- [fol. 27] tlors and sons in Coolidge v. Loring, 235 Mass. 220, 222, where reformation of the trust instrument of July, 1907, was sought, because the demand on the trustees by the sons after the assignment for immediate distribution of the fund had been refused by reason of the "possible claim of a contingent interest on behalf of wives and children of sons pre-deceasing" the settlors. If no ultimate succession had been contemplated under the trust instrument of July, 1907, the assignment to the sons of the life interests of the settlors would have vested in the sons such complete

interest in the trust fund that they would have been in effect absolute owners of it, and it might have been reasonable and just that they should have had the control and disposal of it, unless some good cause appeared to the contrary. Sears v. Hardy, 120 Mass. 524. Sears v. Choate, 146 Mass. 395, 398. Claflin v. Claflin, 149 Mass. 19, 22. Langley v. Conlan, 212 Mass. 135, 138. See Forbes v. Snow, 245 Mass. 85, 93, and Abbott v. Williams, Mass. Adv. Sh. (1929) 1667, 1669. But manifestly the trust could not then terminate, because the succession could not take place or be ascertained until the death of the survivor of the settlors.

It is not necessary to the validity of the excise on succession that an interest in the property pass directly from the grantor or settlor at the time of his death. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, Mass. Adv. Sh. (1929) 1233, 1237. If the beneficiary under the instrument of gift succeeds to an interest in the property not previously enjoyed, which bears a distinct and necessary relation to the death of the grantor or settlor, that is a succession subjected to the excise by the terms of the statute.

Plainly under the deed of July, 1907, the ultimate beneficiaries could not be determined with certainty until the death of both settlors.

[fol. 28] However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them, might so predecease could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate.

The interest of the sons surviving the settlors in the trust fund did not pass to them finally and irrevocably until and because of the death of both settlors. The property conveyed to the trustees by the deed of trust was so limited that it vested in the sons who should survive both settlors in interest, possession and enjoyment only by reason of and upon the death of the survivor of the settlors. This succession falls within the descriptive words of the statute. The five sons of the settlors, who have become the ultimate beneficiaries of the trust, had no power of control

individually or collectively over the trust fund while either of the settlors continued to live. They had no possession of it. That was vested exclusively in the trustees. They had no enjoyment of the trust fund, except as a vision of the future. They had no power of disposal of the whole or any part of the corpus of the trust estate. That power was enjoyed by the trustees alone. The extent of their interest was, at most, a remainder subject to be divested upon a condition subsequent with a limitation over upon the happening of that contingency. Clarke v. Fay, 205 Mass. 228, where cases are collected and reviewed. Blanchard v. Blanchard, 1 Allen, 223, 226. The nature of their interest might be the subject of assignment. Other interests of which the assignor has no possession or enjoyment may be assigned.

Citizens Loan Association v. Boston & Maine Railroad, 196 Mass. 528, 530, 531. Taylor v. Barton Child Co. 228 Mass. [fol. 29] 126, 130. Such rights are potential only and not vested in possession and enjoyment.

Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and to use the proceeds of the property such as came to them upon the death of the last surviving settlor.

It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contingency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust.

It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. It seems to us that this change constituted a succession. The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. We think that this

constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place.

This is the inevitable result of our own decisions. Numerous excerpts from opinions written by judges eminent for learning and wisdom leading to that conclusion are collected in Magee v. Commissioner of Corporations & Taxation, 256 Mass. 512, 515, 516, and in Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, 523, 524. It seems unnecessary to repeat them. They are referred to [fol. 30] as in part the basis of this decision. In discussion as to the nature of succession and the accrual of rights made subject to the excise upon succession, it was said in State Street Trust Co. v. Treasurer & Receiver General, 209 Mass. 373, at page 378: "The test * * * by which * * * exemption (from the excise) is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax * * * the intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life."

The test thus stated supports the excise here assailed. Although the facts in the case at bar differ in some particulars from those in Saltonstall v. Saltonstall, 276 U. S. 260, we think that that decision supports the conclusion that these excises might lawfully be levied.

The principle that no law is to be construed as operating retro-actively unless imperatively required by the words of the statute is recognized. Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, where cases are reviewed. Fullerton-Krueger Lumber Co. v. Northern Pacific Railway, 266 U. S. 435, 437. That principle is not here applicable because the succession, which is the subject of the excise, was not fully accomplished until after the enactment of the governing statute. Tax laws are to be strictly construed and every doubt resolved in favor of the taxpayer. Eaton, Crane & Pike Co. v. Commonwealth, 237

Mass. 523. The words of the already quoted statutes, con- [fol. 31] strued according to the natural and approved usage of the language, plainly include within their ambit such a succession as here has been taxed. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401. Kennedy v. Commissioner of Corporations & Taxation, 256 Mass. 426, 430. The authorities already cited appear to us to establish the constitutionality of the statute under which this excise was laid. Giving full weight to all these principles, they do not militate against the constitutionality of the present statute and of the excise levied thereunder.

The succession, as here defined and made subject to the excise, has been recognized for many years as a commodity which rightly may be made subject to an excise. Minot v. Winthrop, 162 Mass. 113, 115-122. Callahan v. Woodbridge, 171 Mass. 595, 597. Crocker v. Shaw, 174 Mass. 266, 267. Minot v. Treasurer & Receiver General, 207 Mass. 588. Attorney General v. Stone, 209 Mass. 186. Burnham v. Treasurer & Receiver General, 212 Mass. 165. Clark v. Treasurer & Receiver General, 226 Mass. 301, 305. The element of succession being the taxable commodity does not deny to the petitioners the equal protection of the laws nor does it deprive them of property without due process of law. Cohen v. Brewster, 203 U. S. 543. Chanler v. Kelsey, 205 U. S. 466. Nickel v. Cole, 256 U. S. 222. Saltonstall v. Saltonstall, 276 U. S., 260.

The validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited.

The case at bar is distinguishable from Shwab v. Doyle, 258 U. S. 529, Shukert v. Allen, 273 U. S. 545, Nichols v. [fol. 32] Coolidge, 274 U. S. 531, Reinecke v. Northern Trust Co. 278 U. S. 339, 345, 347, and Chase National Bank v. United States, 278 U. S. 327. In each of those cases the tax under consideration was the Federal estate tax levied upon the property of the deceased transmitted at his death. That is a tax levied upon a subject quite different from the succession to property by a beneficiary, which is the subject of the present excise.

The case at bar is distinguishable from Dexter v. Treasurer & Receiver General, 243 Mass. 523, 525. In that case it was held that the "property" passed not upon the death of the donor but upon an outside event, and that "it did not pass by deed intended to take effect in possession or enjoyment after his death." The same in substance is true of People v. Northern Trust Co. 330 Ill. 238. The case at bar also is distinguishable from the points decided in First National Bank v. Commissioner of Corporations & Taxation, 258 Mass. 253.

It follows that each petition for abatement must be denied and decrees are to be entered to that effect.

Ordered accordingly.

Norfolk County:

A true copy of an attested true copy. Attest: James F. Reynolds, Assistant Register.

Certificate to foregoing paper omitted in printing.

[fol. 33] In Probate Court of Norfolk County

Final Decree

At a Probate Court holden at Dedham, in and for said County of Norfolk, on the 23rd day of December in the year of our Lord one thousand nine hundred and twenty-nine.

On the petition in equity of Harold J. Coolidge and Augustus P. Loring, trustees under a certain deed and declaration of trust (dated July 20, 1907) executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others, against Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, respondent, praying that a certain inheritance tax referred to in said petition be abated, it appearing that notice according to the order of the Court was given the respondent, that the respondent, having been notified according to the order of the Court, duly appeared and answered, that the petition came on to be heard in this Court upon the pleadings and certain agreed facts, that the petitioners duly presented seven requests

for rulings of law, that the petition was thereupon reserved and reported for the determination of the Supreme Judicial Court, (said requests for rulings being embodied in the reservation and report), and that a rescript has been received from the Supreme Judicial Court, this Court, after hearing and consideration and in accordance with said rescript and with the opinion referred to therein, doth order and decree that said requests for rulings be and they hereby are severally denied and that said petition be and it hereby is dismissed.

Joseph R. McCoole, Judge of Probate Court.

[fol. 34] Dec. 6, 1929.

This decree is satisfactory in form to the respondent.

Henry F. Long, Commissioner, by Joseph E. Warner, Atty. Gen., by James S. Eastham, Asst. Atty. General.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 35] In Probate Court of Norfolk County

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed Dec. 23, 1929

Considering themselves aggrieved by the final decree entered in the above-entitled cause (pursuant to the decision and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts) by the Probate Court for the County of Norfolk in said Commonwealth under the docket number 67743 the petitioners therein, Harold J. Coolidge and Augustus P. Loring, trustees under a trust indenture (dated July 20, 1907) executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others, hereby pray that an appeal be allowed to the Supreme Court of the United States herein and that

there be entered an order fixing the amount of the bond on such appeal.

Said Harold J. Coolidge and Augustus P. Loring, trustees as aforesaid, assign the following errors in the record and proceedings herein:

1. Said Supreme Judicial Court erred in refusing to hold that Section 1 of Chapter 65 of the General Laws of Massachusetts (as construed by said court) is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in said trust indenture.

[fol. 36] 2. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in said trust indenture.

3. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said Court) is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the instrument dated April 6, 1917, whereby said J. Randolph Coolidge and Julia Coolidge assigned all their interest in the fund held in trust under said indenture to J. Randolph Coolidge, Jr., and others.

4. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the instrument dated April 6, 1917, whereby said J. Randolph Coolidge and Julia Coolidge assigned all their interest in the fund held in trust under said indenture to J. Randolph Coolidge, Jr., and others.

5. Said Supreme Judicial Court erred in refusing to hold that said Section I (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

6. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to au- [fol. 37] thorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

7. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said court) denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

8. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

9. Said Supreme Judicial Court erred in holding that the tax now in question was lawfully assessed and that the petitioners are not entitled to the abatement thereof.

10. Said Probate Court erred in denying the petitioners' prayer for abatement and in dismissing their petition.

For which errors said petitioners Harold J. Coolidge and Augustus P. Loring, trustees under said trust indenture, pray that the final decree of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts entered in the above-entitled cause on December 23, 1929, (pursuant to the decision and rescript of the Supreme Judicial Court of said Commonwealth) be reversed and a decree entered in favor of said petitioners and for their costs.

Storey, Thorndike, Palmer & Dodge, Solicitors for Appellants.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 38] IN PROBATE COURT OF NORFOLK COUNTY

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 23, 1929

The appellants in the above-entitled suit and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree entered in the above-entitled suit by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts under the docket number 67743 on the twenty-third day of December 1929, and from each and every part thereof and having presented and filed their petition for appeal, assignment of errors and prayer for reversal pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided; it is hereby ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Probate Court for the County of Norfolk and Commonwealth of Massachusetts in the above-entitled cause as provided by law and it is further ordered that the register of probate for said County of Norfolk shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty days of this date.

[fol. 39] And it is further ordered that security for costs on appeal be fixed in the sum of $100, for which sum a bond without surety is to be filed by the appellants.

Joseph R. McCoole, Judge of the Probate Court for the County of Norfolk, in the Commonwealth of Massachusetts.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fols. 40 & 41] Bond on appeal for $100.00 approved and filed December 23, 1929, omitted in printing.

[fols. 42 & 43] Citation, in usual form, showing service on Joseph E. Warner, omitted in printing.

[fol. 44] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Jan. 18, 1930

The appellants adopt their assignments of error as their statement of the points to be relied upon and represent that the whole of the record as filed (other than the bond on appeal) is necessary for the consideration of the case.

Robert G. Dodge, Counsel for Appellants.

Boston, Mass., January 16, 1930.

Due and sufficient service of the foregoing statement and designation is hereby acknowledged.

Joseph E. Warner, Attorney General of Massachusetts, by R. Ammi Cutter, Assistant Attorney General of Massachusetts.

[fol. 45] [File endorsement omitted.]

Endorsed on cover: File No. 34,715. Massachusetts, Probate Court for the County of Norfolk. Term No. 584. Harold J. Coolidge and Augustus P. Loring, trustees, appellants, vs. Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed January 18, 1930. File No. 34,715.